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QUARTERLY SYNOPSIS OF FLORIDA CASES*

The Florida Supreme Court decided about one hundred and seventy-five cases during the period reported from December 11, 1952, through February 19, 1953. Those opinions (excluding memorandum decisions and a few others not considered of sufficient importance to be noted here) found in 61 So.2d 249 to 62 So.2d 608 are herewith reported. In addition three federal cases interpretative of Florida law are included. These were found from 73 Sup. Ct. 215 to 73 Sup. Ct. 390 (advanced sheets from January 1, 1953 through February 15, 1953); 199 F.2d 457 to 200 F.2d 568 (advanced sheets from December 22, 1952 through February 9, 1953); and 108 F. Supp. 1 to 109 F. Supp. 264 (advanced sheets from December 22, 1952, through February 23, 1953).

ATTORNEYS. Bar association: Dues. The Supreme Court has granted the petition of the Florida Bar Association to change the annual dues. A \$10 per annum maximum was placed on the amount to be fixed at the annual Bar meeting.¹

BROKERS. Exclusive right to sell. A contract granting a real estate broker the exclusive right to sell certain property will be binding in the event of any sale of this property, whether by broker or owner.²

CIVIL RIGHTS. Convicts: Corporal punishment. One of the powers reserved to the states is the power to conduct and administer their own penal institutions. This power includes the methods of punishing or disciplining its convicts. Therefore the Federal Courts cannot consider the question of brutality in the treatment of a state prisoner.³

CONFLICTS OF LAW. Full faith and credit: Estoppel by judgment. When there is no change of conditions and the suit is between the same parties, a foreign decree will operate as an estoppel by judgment and, therefore, be given full faith and credit even though the action in Florida is different from that brought in the other state.⁴

Full faith and credit: Foreign custody decree. Florida must follow the mandate of a sister state's judgment in a custody proceeding where the

* This issue of the Quarterly Synopsis was written by Joseph Manners and edited by Lewis L. Cosor.

1. *In re Florida Bar*, 62 So.2d 20 (Fla. 1952).

2. *Flynn v. McGinty*, 61 So.2d 318 (Fla. 1952).

3. *United States v. Jones*, 108 F. Supp. 266 (S.D. Fla. 1952).

4. *Weldgen v. Weldgen*, 62 So.2d 420 (Fla. 1952).

defendant had been represented by counsel unless new conditions have arisen.⁵

CONSTITUTIONAL LAW. *Constitutionality of statute.* The fact that the constitutionality of an amendment was brought up for determination, does not permit the court to also consider the constitutionality of the act itself.⁶

Free Speech: Information about horse racing. The time limitation imposed by the statute making it unlawful to transmit or communicate any information about a horse race until thirty minutes after the "official" posting⁷ is a just exercise of the police power and does not violate the constitutional guaranty of free speech.⁸

CONTRACTS. *Competitive bidding: Clerical error.* A clerical error discovered after a bid is accepted will not relieve a competitive bidder from his liability.⁹

Surety. There are three views concerning the liability of a surety when there has been a departure in a contract. The first, or common law rule, says that even a slight departure from the terms of the contract will relieve and discharge the surety from liability. The second view holds that there must be a *material* departure from the construction of the contract in order that the surety be relieved from liability. Under the third, and the one followed by Florida, the court determines whether the departure from the contract results in injury to the surety, then *ipso facto* such departure must be classified as material, but the surety should only be relieved to the extent of the injury.¹⁰

CRIMINAL LAW. *Double jeopardy.* "To constitute double jeopardy, it is not enough that the second prosecution arise out of the same facts as the first. It must be for the same 'offense'. The same act may constitute an offense against two separate statutes. The recognized test . . . is whether or not the same proof will sustain a conviction under both, or whether one requires proof of facts not required by the other."¹¹

Immunity from prosecution: License revocation. The immunity granted an individual testifying involuntarily before a grand jury¹² extends to administrative board action to revoke his license.¹³

Prejudicial statements: It is extremely prejudicial for a state's attorney to dwell on, or even make mention of, the defendant's religion, occupation or prior offenses. The court should make clear to the jury that such behavior is not condoned.¹⁴

5. *Lambertson v. Williams*, 61 So.2d 478 (Fla. 1952).

6. *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1953).

7. FLA. STAT. § 550.35 (1951).

8. *State v. Ucciferri*, 61 So.2d 374 (Fla. 1952).

9. *Graham v. Clyde*, 61 So.2d 656 (Fla. 1952).

10. *Gibbs v. Hartford Accident & Indemnity Co.*, 62 So.2d 599 (Fla. 1953).

11. *Bacom v. Sullivan*, 200 F.2d 70 (5th Cir. 1952).

12. FLA. STAT. § 932.29 (1951).

13. *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952).

14. *Gluck v. State*, 62 So.2d 71 (Fla. 1952).

Separation of Jury. The old rule in capital cases was that separation of the jurors raised a presumption of injury to the rights of the defendants necessary for state to rebut. A statute¹⁵ has modified this rule as to both capital and non-capital cases and the burden of proof has shifted to defendant when and if he claims injury.¹⁶

DECLARATORY JUDGMENTS. Rights of a party. To obtain a declaration of rights under a contract there must be a question of construction or validity. The declaratory judgment statute¹⁷ can not be extended to determine the ultimate outcome of a question of fact.¹⁸

Same issues ready for trial at law. A landlord may maintain a suit in equity to have terms of a lease construed where the determination of issues in a pending law action by the tenant against the landlord might be inconclusive as to the landlord's liability for performance or non-performance.¹⁹

DIVORCE. Appeal: Death of appellee. The death of an appellee, after an appeal opposing a final divorce decree is filed, is not grounds for dismissal.²⁰

EQUITY. Appeal and error: Conflicting evidence. A final decree in an equity case entered on conflicting evidence shall be affirmed unless some inapplicable rule of law is shown to have influenced the chancellor's conclusion.²¹

EVIDENCE. Admissibility: Rule with reference to notice. A contract, the existence and even some of the terms of which had been testified to, and which was in possession of one of the parties in the court, should have been admitted in evidence. Under the circumstances, the rules as to notice did not have to be complied with.²²

Judicial notice: Ordinance. An ordinance used as an affirmative defense must be proved as the court will not take judicial notice of it. However, if the plaintiff is in control of the records, or has through his dereliction lost them, he cannot invoke the above rule; and evidence may be introduced to show passage of the ordinance.²³

Privilege: Physician's testimony. Communications of a patient to a doctor are not privileged when such privilege will obstruct justice. A doctor's testimony about the patient's condition before the negligent act complained of is admissible.²⁴

FAMILY LAW. Bastardy Act: Time of birth immaterial. A father must contribute to the support of his bastard child once paternity is established.

15. FLA. STAT. § 920.05 (1951).

16. Webb v. State, 62 So.2d 410 (Fla. 1953).

17. FLA. STAT. § 87.02 (1951).

18. Columbia Casualty Co. v. Zimmerman, 62 So.2d 338 (Fla. 1953).

19. Lincoln Tower Corp. v. Dunhall's-Florida, 61 So.2d 474 (Fla. 1952).

20. Busch v. Busch, 62 So.2d 68 (Fla. 1952).

21. Knowles v. Benson, 61 So.2d 365 (Fla. 1952).

22. Nottingham v. Schulhof, 61 So.2d 912 (Fla. 1953).

23. Town of Crystal River v. Williams, 61 So.2d 382 (Fla. 1952).

24. Morrison v. Malmquist, 62 So.2d 415 (Fla. 1953).

It is immaterial whether the child is born before or after the effective date of the Florida Bastardy Act.²⁵

Separation agreements: Severability. An agreement between husband and wife providing for certain monthly benefits to wife for life is valid even though this same agreement requires permanent separation of the parties. The court treats the separation statement as *nudum pactum* and severable.²⁶

FLORIDA ELECTIONS. *Ballots: Signature irregularities.* In a county small enough that one elector could know personally each elector whose vote was challenged, the writing of the electors' names, by the election board, on stubs number one, does not invalidate the ballots.²⁷

HUSBAND AND WIFE. *Loss of husband's services.* Even though a husband may recover in tort for the loss of his wife's service, the converse is not true. The common law rules relative to women's rights and torts, frequently changed by the legislature, have not been changed in this respect. Therefore, the law as it stands must have met with legislative approval.²⁸

INSURANCE. *Insured: Right to enforce claims.* Only the insured has the legal right to enforce a claim against a tort-feasor. The insurer, even after payment of loss, cannot sue on the claim except in the name of the insured for the use and benefit of the insurer.²⁹

JUDICIAL ADMINISTRATION. *State Board of Law Examiners.* The statute which authorizes the Supreme Court to impose additional duties on the State Board of Law Examiners³⁰ pertains only to the qualifications of examinees. This act does not enlarge the inherent power of the court. Therefore, the court is without power to authorize the appointment of an administrative officer for the Board.³¹

LIBEL AND SLANDER. *Actionable per se.* A radio announcer imputed that a city official had been guilty of misconduct, but kept secret the exact nature of the act. The commentator's statements are actionable *per se*.³²

LICENSES. *Incidental business.* License tax statutes are both penal and an imposition. They should be construed strictly against the government. If a person is engaged in a primary business of selling tangible personal property, and has an incidental activity, such as a free medicine show which serves no other person or business, this secondary activity may not be separately or additionally taxed.³³

LIENS. *Conditional sale.* The lien of the assignee of a conditional sales

25. FLA. STAT. § 742.01 *et seq.* (1951); *Rooney v. Teske*, 61 So.2d 376 (Fla. 1952).

26. *Scott v. Scott*, 61 So.2d 324 (Fla. 1952).

27. *Wilson v. Revels*, 61 So.2d 491 (Fla. 1952).

28. *Ripley v. Ewell*, 61 So.2d 420 (Fla. 1952).

29. *Could v. Weibel*, 62 So.2d 47 (Fla. 1952).

30. FLA. STAT. § 454.031 (1951).

31. *Petition of Florida Bar*, 61 So.2d 646 (Fla. 1952).

32. *Richard v. Gray*, 62 So.2d 597 (Fla. 1953).

33. *Millinor v. State ex rel. Beaver*, 61 So.2d 377 (Fla. 1952).

contract is superior to that of a subsequent purchaser, but only to the amount of his interest.³⁴

Federal and state: Priority. The Federal Statutes do not attempt to give a federal tax lien priority over a materialman's lien.³⁵ The state statutes give the materialman a right to a lien from the day the first material is furnished and makes it prior to other claims.³⁶ In a case where a materialman's lien accrued prior to, and was recorded before, a federal tax lien, the materialman's lien has priority.³⁷

Materialman's lien: Non-compliance with statute. A materialman's lien may be valid without compliance with the statute³⁸ where a valid contract exists between owner and contractor. However, the materialman cannot recover from the owner in excess of the amount remaining unpaid to the contractor.³⁹

MORTGAGES. Deeds: Assumption clause. A grantee, who accepts a deed expressly reciting that he agrees to assume the mortgages becomes the primary obligor of the debt. However, in the absence or failure of valid consideration, the grantee will not be liable under the assumption clause.⁴⁰

MUNICIPAL CORPORATIONS. Limitations on actions against municipalities. It is within the power of the legislature to impose limitations on actions against municipal corporations not common to actions against private corporations or individuals.⁴¹

Revenue bonds: Approval. Revenue bonds, issued for a public purpose and payable solely from revenues derived from sources other than ad valorem taxes, do not require an approving note of the freeholders.⁴²

Tort liability: Charter restriction as to time. Charter restrictions, requiring a plaintiff to notify the city of his claim of negligence thirty days after injury, are valid. However, where the plaintiff is rendered unconscious by the negligent act charged, and remains unconscious for thirty days or more, he will not be precluded from recovery for failure to comply with the charter regulations.⁴³

NEGLIGENCE. Duty: Sufficient number of employees. An employer has the duty to provide a sufficient number of employees. He is negligent if the proximate cause of an employee's injury is the lack of fellow servants.⁴⁴

Railroads: Running of train. A railroad is liable for any damage

34. *Livingston v. National Shawmut Bank of Boston*, 62 So.2d 13 (Fla. 1953).

35. 53 STAT. 448, 449 (1939). 26 U.S.C. §§ 3670, 3672 (1946).

36. FLA. STAT. C. 84 (1951).

37. *United States v. Griffin-Moore Lumber Co.*, 62 So.2d 589 (Fla. 1953).

38. FLA. STAT. § 84.04 (1951).

39. *Foley Lumber Co. v. Koester*, 61 So.2d 634 (Fla. 1952).

40. *Robertson v. Robertson*, 61 So.2d 499 (Fla. 1952).

41. *Coleman v. City of St. Petersburg*, 62 So.2d 409 (Fla. 1953).

42. *State v. City of Miami*, 62 So.2d 407 (Fla. 1953).

43. *City of Miami Beach v. Alexander*, 61 So.2d 917 (Fla. 1952). See Note, 7 MIAMI L.Q. 438 (1953).

44. *Great Atlantic & Pacific Tea Co. v. McConnell*, 199 F.2d 569 (5th Cir. 1952).

caused by the *running* of its trains.⁴⁵ By interpretation, the word "running" includes "operation" of the train. A railroad is liable for any negligence even while its train is stopped if it is under the control of employees whose acts are being done in operation of the train.⁴⁶

NEGOTIABLE INSTRUMENTS. *Accommodation maker.* An accommodation maker of a note is liable under statute⁴⁷ even though, at the time of the taking of the instrument, the holder knew him to be only an accommodation party.⁴⁸

OFFICERS. *Assistant State Attorney: Power to sign indictments.* An Assistant State Attorney has the power to sign an indictment⁴⁹ while an assistant to the State Attorney may not.⁵⁰

PHYSICIANS AND SURGEONS. *Ethics: Divulging results of examination.* Reports of mental and physical examinations of persons by doctors should not be furnished to others without the patient's consent.⁵¹

PRINCIPAL AND AGENT. *Apparent authority.* A doorman, who has paid for the privilege of the "door", and whose duty of parking cars is part of the service of the hotel, is the apparent agent of that hotel.⁵²

PROCEDURE. *Appeal and error: Additional directions to clerk.* There are no provisions in the statutes or rules of court for the filing of "Additional Directions to the Clerk" later than ten days after filing of the notice of appeal. The proper procedure would be to apply to the Supreme Court or the trial court for an extension of time or for such an order as the Court may see fit to make.⁵³

Appeal and error: Exception to charge. A party must except to a charge of the court in order to perfect an appeal. The correctness of the charge cannot be challenged for the first time in the appellate court.⁵⁴

Appeal and error: Payment of costs. An appeal may be taken only after the appellant has paid all costs which have accrued up to the time the appeal is taken.⁵⁵ However, the judgment should put the appellant on notice of what he is required to pay. A mere statement like "dismissed at the cost of the plaintiff" is not sufficient to produce a dismissal for non-payment of costs.⁵⁶

Motion for new trial. Filing a motion for a new trial with the clerk

45. FLA. STAT. § 768.05 (1951).

46. *Horton v. Louisville & N. R. R.*, 61 So.2d 406 (Fla. 1952).

47. FLA. STAT. § 674.32 (1951).

48. *Rapp v. Demmerle*, 61 So.2d 481 (Fla. 1952).

49. FLA. STAT. §§ 27.19, 27.21, 27.22 (1951).

50. FLA. STAT. § 27.18 (1951); *Owens v. State*, 61 So.2d 412 (Fla. 1952).

51. FLA. STAT. § 458.16 (1951); *Morrison v. Malmquist*, 62 So.2d 415 (Fla. 1953).

52. *Stuyvesant Corp. v. Stahl*, 62 So.2d 18 (Fla. 1953).

53. *Fouts v. Fouts*, 61 So.2d 322 (Fla. 1952).

54. FLA. COMMON LAW RULES § 39(b); *Adams v. Royal Exchange Assur.*, 62 So.2d 591 (Fla. 1953).

55. FLA. STAT. § 59.09 (1951).

56. *MacNeill v. Marks*, 61 So.2d 648 (Fla. 1952).

of the court is sufficient to satisfy the court rule.⁵⁷ Personal presentation of the motion to the trial judge is not necessary.⁵⁸

Motion for summary judgment. It is sufficient for a party defending against a motion for a summary judgment to disclose to the court his intention to offer proof of facts which, if they contradict the facts to be adduced in evidence by the movent, present a jury issue. He is not required to present his entire case nor the testimony, by affidavit or otherwise, of all his witnesses.⁵⁹

Notice of appeal. A notice of appeal is effective to appeal only one case. One notice may not contain several court file numbers.⁶⁰

Venue: Corporations. A Florida corporation authorized to establish offices, agencies or other places of business in any part of the state and actually maintaining an office in a county where a suit is brought, will be denied a plea of privilege to be sued in its "home" county.⁶¹

Writ of mandamus. A writ of mandamus must prove availing before it can be issued. If the papers asked to be shown to the court had been destroyed, the writ should not be issued.⁶²

REAL PROPERTY. Contracts: Tender of payment. A vendor may not terminate a contract for the failure of the vendee to make prompt tender of the purchase price where the property had been delivered and construction, as contemplated by the contract, had commenced.⁶³

Conveyance without considerations: Owner not estopped. A party claimed ownership of property which was fraudulently conveyed by another to a third person. He was a party to a deed made to forestall litigation on the fraudulent conveyance. This was found to be a conveyance in form only—a mere paper transaction without consideration—conveying to him nothing he did not already have. The claimant is not estopped from asserting his ownership.⁶⁴

Easements: Way of necessity. A property owner does not have to permit an adjacent landowner the use of his private roads for egress or ingress to the public highway even when the common law easements designed to afford access to the highway are not usable. To apply the statute⁶⁵ in this case would violate the due process clauses of the federal and state constitutions.⁶⁶

57. FLA. STAT. § 54.24 (1951).

58. Mead v. Bentley, 61 So.2d 428 (Fla. 1952).

59. Williams v. Board of Public Instruction, 61 So.2d 493 (Fla. 1952).

60. Rocklin v. State, 61 So.2d 484 (Fla. 1952).

61. Central Life Ins. Co. of Florida v. Afro-American Life Ins. Co., 61 So.2d 653 (Fla. 1952).

62. State ex rel. Ostroff v. Pearson, 61 So.2d 325 (Fla. 1952).

63. Highlands Home Builders v. Marine Bank & Trust Co., 61 So.2d 505 (Fla. 1952).

64. Robertson v. Robertson, 61 So.2d 499 (Fla. 1952).

65. FLA. STAT. § 704.01 (1951).

66. U. S. CONST. AMEND. XIV; FLA. CONST. § 12; South Dade Farms v. B. & L. Farms Co., 62 So.2d 350 (Fla. 1952).

Land purchased at public auction. Land purchased at a statutory public auction⁶⁷ must be delivered, in the absence of fraud, collusion, or other misconduct.⁶⁸

Public easements: Individual's right to enjoy. An individual, to enforce his right to use a public street, must base his action on a special or particular injury, "differing not only in degree but also in kind, from that sustained by the community at large."⁶⁹

Revocation of dedication. A grantor of land previously dedicated to a municipality may revoke the dedication if there has been no acceptance by the city or public.⁷⁰

SALES. Statutes: Ice milk. "Ice milk" may be sold in a pastry cup container similar to an ice cream cone. This will not be in violation of the statute⁷¹ requiring the sale to be in a "package or enclosed in a wrapper."⁷²

STATUTES. Titles: Constitutionality. The statute pertaining to "use taxes"⁷³ is unconstitutional because of defective title. Subsequent ratification by amendment⁷⁴ would not make it valid *ab initio*.⁷⁵

The requirement that the subject of an act shall be briefly expressed in its title⁷⁶ is violated by an act which indicates a repeal and in reality constitutes a minor change.⁷⁷

Sunday Closing Laws: Application. The Florida "Sunday Closing Laws"⁷⁸ are unconstitutional in failing to apply to garages, parking lots, and the like, because the stated exceptions have no rational connection to the state police power (the health, safety, morals and general welfare). The Florida Constitution forbids classifications unrelated to the police power.⁷⁹

TRUSTS. Parol declaration. A parol declaration of trust will not divest title to real property which was voluntarily conveyed to the grantee. Except for resulting or constructive trusts, a declaration of trust in realty must be manifested by some writing under Florida statute.⁸⁰

WORKMEN'S COMPENSATION. Appeal: Time. Under the Workmen's Compensation Act⁸¹ the time for taking an appeal is fixed. It is not extended or rendered inapplicable by claimant's legal incompetency.⁸²

67. FLA. STAT. § 194.55 (1951).

68. *State v. Owens*, 62 So.2d 403 (Fla. 1953).

69. *Brooks-Garrison Hotel Corp. v. Sara Inv. Co.*, 61 So.2d 913 (Fla. 1953).

70. *Ibid.*

71. FLA. STAT. § 503.07 (1951).

72. *Mayo v. Ar-Tik Systems*, 62 So.2d 408 (Fla. 1953).

73. FLA. STAT. § 212.01 (1949).

74. FLA. STAT. § 212.01 (1951).

75. *Thompson v. Intercounty Tel. & Tel. Co.*, 62 So.2d 16 (Fla. 1953).

76. FLA. CONST. Art. 3, § 16.

77. *City of Miami v. Headley*, 61 So.2d 321 (Fla. 1952).

78. FLA. STAT. §§ 855.01, 855.02 (1951).

79. *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952).

80. FLA. STAT. § 689.05 (1951); *Wodonos v. Wodonos*, 62 So.2d 78 (Fla. 1952).

81. FLA. STAT. § 440.01 *et seq.* (1951).

82. *Faulk & Coleman v. Harper*, 62 So.2d 62 (Fla. 1952).

Appellate procedure. Provisions of the Uniform Appeals Act⁸³ do not apply to workmen's compensation cases. In perfecting appeals, the appellate provisions of the Workmen's Compensation Act⁸⁴ must be followed.⁸⁵

Evidence: Course of the employment. A claimant for workmen's compensation has only to show a state of facts which will reasonably infer that the accident took place during the course of the employment.⁸⁶

83. FLA. STAT. C. 59 (1951).

84. FLA. STAT. § 440.27 (1951).

85. *Smith v. Fletcher Motor Sales*, 62 So.2d 60 (Fla. 1952).

86. *American Airmotive Corp. v. Moore*, 62 So.2d 37 (Fla. 1952).